

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

ERWIN E. FRATZKE and SHARON A.
FRATZKE,

Plaintiffs,

vs.

COVENANT MEDICAL CENTER,
INC., and GERALD M. WAIT, M.D.,

Defendants.

No. C00-2093

INSTRUCTIONS TO THE JURY

INTRODUCTION/DUTIES/BURDENINSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence.

Counsel will quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you of course are to be governed by the instructions.

You are not to judge the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

This case should be considered and decided by you as an action between persons of equal standing in the community. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Whenever a party must prove something they must do so by the preponderance of the evidence. Preponderance of the evidence is evidence that is more convincing than opposing

INSTRUCTION NO. 1 (Cont'd)

evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

EVIDENCEINSTRUCTION NO. 2

You shall base your verdict only upon the evidence and these instructions. Evidence is: (1) testimony in person or by deposition; (2) exhibits received by the court; and (3) any other matter admitted. Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide. The following are not evidence: (1) statements, arguments, questions and comments by the lawyers; (2) objections and rulings on objections; (3) testimony I told you to disregard; and (4) anything you saw or heard about this case outside the courtroom.

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable. In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness' testimony. There are many factors which you may consider in deciding what testimony to believe, for example: (1) whether the testimony is reasonable and consistent with other evidence you believe; (2) the witness' appearance, conduct, intelligence, memory and knowledge of the facts; (3) whether the witness has given statements in the past that are inconsistent with his or her testimony at trial; and (4) the witness' interest in the trial, their motive, candor, bias and prejudice.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

INSTRUCTION NO. 2 (Cont'd)

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing or on videotape. Consider that testimony to the best of your ability as if it had been given live in court.

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

MEDICAL NEGLIGENCEINSTRUCTION NO. 3

In order to prevail on her claim for medical malpractice, plaintiff Sharon Fratzke must prove all of the following numbered propositions:

1. That defendant Dr. Gerald Wait was negligent in failing to timely recommend exploratory surgery to Sharon Fratzke within 48 hours after her admission to Covenant Hospital.
2. That the negligence of Dr. Wait was a proximate cause of injury to plaintiff Sharon Fratzke.
3. That Sharon Fratzke or Erwin Fratzke suffered damages that were caused by Dr. Wait's negligence.

If the plaintiff has failed to prove any of these numbered propositions, she is not entitled to damages. If Sharon Fratzke has proved all of these propositions, plaintiffs are entitled to damages in some amount.

"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner. A violation of this law is negligence. In particular, the plaintiffs must prove that Dr. Wait failed to recommend surgery within 48 hours after Sharon Fratzke's admission and that it violated the standard of care among physicians to fail to do so under the circumstances presented here.

INSTRUCTION NO. 3 (Cont'd)

Ordinarily, a physician is not an insurer of the success of any procedure or course of treatment. The mere fact that a patient was injured does not mean a doctor was negligent.

A patient has the right to exercise control over his or her body. This includes the right to refuse treatment. In recognition of this right of control, a doctor must obtain a patient's consent before performing a surgical procedure.

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. There can be more than one proximate cause of an injury or damage. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

DAMAGESINSTRUCTION NO. 4

If you find that Sharon Fratzke is entitled to recover damages, it is your duty to determine the amount of these damages. You shall consider the following items of damages claimed by the plaintiffs.

1. That portion of the plaintiff's hospital charges, doctor charges, prescriptions, and other medical services from the date of injury to the present time that have not been paid by health insurance. The parties agree that this amount is \$1,958.29.
2. The reasonable value of lost income to the present time.
3. The present value of loss of future earning capacity. Loss of future earning capacity is the reduction in the ability to work and earn money generally, rather than in a particular job.
4. Physical and mental pain and suffering from the date of injury to the present time. Physical pain and suffering may include, but is not limited to, unpleasant feelings, bodily distress or uneasiness, bodily suffering, sensations or discomfort. Mental pain and suffering may include, but is not limited to, mental anguish, nervousness, worry, anxiety, irritability, disappointment, depression, confusion, apprehension, embarrassment, loss of enjoyment of life, a feeling of uselessness or emotional distress.
5. Future physical and mental pain and suffering. Physical and mental pain and suffering have already been explained to you in this instruction.
6. Loss Of Full Mind And Body - Past. Loss of function of the mind and body from the date of injury to the present time. Loss of mind and body is the inability of a particular part of the mind and body to function in a normal manner.
7. Loss Of Full Mind And Body - Future. Future loss of function of the mind and body.

INSTRUCTION NO. 4 (Cont'd)

Aggravation of Pre-Existing Condition

If you find Sharon Fratzke had a ruptured appendix before she was examined by Dr. Wait on November 7, 1998, and this condition was aggravated by Dr. Waite's care and treatment causing further suffering or disability then she is entitled to recover damages caused by the aggravation.

She is not entitled to recover for any physical ailment or disability which existed before she was examined by Dr. Wait or for any injuries or damages which she now has which were not caused by Dr. Wait's actions.

Consortium

If you find in favor of Sharon Fratzke, you may also award damages to plaintiff Erwin Fratzke for any loss of spousal consortium proved by the plaintiffs.

"Spousal consortium" is the fellowship of a husband and wife and the right of each other to the intangible benefits of company, cooperation, affection and the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of monetary support from the injured spouse, nor grief, mental anguish or suffering caused by the spouse's injury.

If you find Erwin Fratzke is entitled to recover damages, it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of loss of spousal consortium which Sharon Fratzke would have performed for Erwin Fratzke from the date of injury until the present time.
2. The present value of loss of spousal consortium which Sharon Fratzke would have performed in the future.

Damages for loss of spousal consortium are limited in time to the shorter of Sharon Fratzke's or Erwin Fratzke's normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

INSTRUCTION NO. 4 (Cont'd)

1. The circumstances of the spouse's life.
2. Their age at the time of their injury.
3. Their health, strength, character and life expectancy and that of the spouse.
4. The spouse's capabilities and efficiencies in performing the duties as a spouse.
5. The spouse's skills and abilities in providing instructions, guidance, advice and assistance.
6. The spouse's respective needs.
7. All other facts and circumstances bearing on the issue.

Life Expectancy

There is evidence showing the normal life expectancy of persons of the age of Sharon Fratzke to be 18 years and Erwin Fratzke to be 11-1/2 years. The length of time one would probably live is based upon the supposed life expectancy of persons of ordinary occupation. You are not to regard this as proof they would have lived a number of years. In determining the life expectancy you may consider the person's health, habits, occupation and any other evidence bearing on the issue of how long they may live.

The amount you assess for some items of damages cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by defendant Dr. Gerald Wait as proved by the evidence.

INSTRUCTION NO. 4 (Cont'd)

Future damages must be reduced to present value. “Present value” is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiff for future losses.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. Add together the amounts, if any you find, for each of the above items and the total will be used to answer the special verdicts.

In arriving at an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage and agreeing in advance that the average of those estimates shall be your item of damage.

INSTRUCTION NO. 4 (Cont'd)

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DELIBERATIONS

INSTRUCTION NO. 5

Upon retiring you shall select a foreperson. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views. Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. Remember you are not partisans or advocates, but are judges -- judges of the facts. Your sole interest is to find the truth and do justice.

I am giving you the following verdict form. If you all agree to the verdict, it will be signed by each juror. When you have agreed upon your verdict and have signed it, inform the Court Attendant.

DATE

JOHN A. JARVEY
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
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FRATZKE,

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vs.

COVENANT MEDICAL CENTER,
INC., and GERALD M. WAIT, M.D.,

Defendants.

No. C00-2093

VERDICT

We, the Jury, find the following verdict on the questions submitted to us:

QUESTION NO. 1:

Have plaintiffs proved that Dr. Gerald Wait was negligent in failing to recommend surgery to Sharon Fratzke within 48 hours of her admission to Covenant Hospital?

Answer "Yes" or "No"

ANSWER: _____

[If your answer is "yes," then proceed to Question No. 2. If your answer is "no," then sign the verdict form and return it to the court attendant.]

QUESTION NO. 2:

VERDICT FORM (Cont'd)

Have plaintiffs proved that the negligence of Dr. Gerald Wait was a proximate cause of injury to the plaintiffs?

Answer "Yes" or "No"

ANSWER: _____

[If your answer is "yes," the proceed to Question No. 3. If your answer is "no," then sign the verdict form and return it to the court attendant.]

QUESTION NO. 3:

State the amount of damages, if any, sustained by the plaintiffs that were proximately caused by Dr. Wait's negligence. If the plaintiffs have failed to prove any item of damage, or have failed to prove that any item of damage was proximately caused by Dr. Wait's negligence, enter "0" for that item.

- | | | |
|----|---|----------|
| 1. | Past medical expenses. | \$ _____ |
| 2. | The reasonable value of lost income to the present time. | \$ _____ |
| 3. | The present value of loss of future earning capacity. | \$ _____ |
| 4. | Physical and mental pain and suffering from the date of injury to the present time. | \$ _____ |
| 5. | Future physical and mental pain and suffering. | \$ _____ |
| 6. | Loss Of Full Mind And Body - Past. | \$ _____ |
| 7. | Loss Of Full Mind And Body - Future. | \$ _____ |

VERDICT FORM (Cont'd)

8. Erwin Fratzke - Past Loss of Consortium. \$ _____

9. Erwin Fratzke - Future Loss of Consortium. \$ _____

TOTAL \$ _____

FOREPERSON

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror